# In the Supreme Court of the United States

OCTOBER TERM, 1971

---

No. 71-889

LILLIAN V. COUCH, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4–A6) is reported at 449 F. 2d 141. The district court's findings of fact and conclusions of law (Pet. App. A7–A13) are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971. The petition for certiorari was filed on January 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether a tax summons requiring that a taxpayer's records be produced by the taxpayer's book-

keeper who kept the records in his possession after using them to prepare tax returns violated the taxpayer's Fifth Amendment privilege against self-incrimination or her right to be free of unreasonable searches and seizures under the Fourth Amendment.

2. Whether a summons issued by a special agent of the Intelligence Division in the course of a joint investigation concerned with the possibility of tax fraud as well as criminal violations of the revenue laws is enforceable under *Donaldson* v. *United States*, 400 U.S. 517.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant provisions of the Constitution and the Internal Revenue Code of 1954 are set forth at Pet. App. A1–A3.

## STATEMENT

The government brought this suit to enforce an Internal Revenue Service summons[1] requiring petitioner's bookkeeper to appear before a special agent of the Service to testify and to produce for examination various books, records, and papers utilized in preparing petitioner's income tax returns.[2] The district court ordered compliance with the summons (Pet.

[1] The summons was issued under Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.).

[2] The summons was entitled "In the matter of the tax liability of Lillian V. Aleshire a/k/a Lillian V. Couch" for "1964–1968 inclusive". It requested the bookkeeper, Harold E. Shaffer, to produce documents described in the summons as follows (R. 9): "All books, records, bank statements, cancelled checks, deposit tickets, * * * work papers, and all other documents pertaining to the tax liability of the above taxpayer." ("R." refers to the record appendix filed by petitioner in the court of appeals.)

App. A7–A13), and the court of appeals affirmed *per curiam* (Pet. App. A4–A6).

The summons was issued during a joint investigation by both the Audit and Intelligence Divisions of the Internal Revenue Service of petitioner's income tax returns for the years 1964 through 1968 (Pet. App. A11). Petitioner's bookkeeper (Mr. Shaffer) had previously permitted Internal Revenue Agent Groves to examine the records in question (R. 16, 27–28). Agent Groves reported that he suspected fraud, as a result of which Special Agent Jennings was assigned to assist with the joint investigation (R. 28–31, 34–35). Special Agent Jennings was chiefly concerned with the possibility of income tax fraud (R. 36), while Agent Groves, who continued his investigation (R. 29), focused on determining the correct tax for civil purposes (R. 41).

On August 18, 1969, Mr. Shaffer refused to allow Special Agent Jennings to examine the records, and Jennings issued the summons here involved (Pet. App. A8; R. 44–45). On September 2, 1969, the date set in the summons for delivering the records, Shaffer instead gave them to petitioner's attorney (John G. Rocovich, Jr.), at petitioner's direction, and Mr. Rocovich has had them ever since (Pet. A9–A10; R. 22–23). This kept Shaffer from complying with the summons, and resulted in the government's seeking judicial enforcement in this proceeding.

Petitioner intervened in the district court and asserted that enforcement of the summons would violate her Fourth and Fifth Amendment rights (Pet. App. A10). The court noted that petitioner had given the

records involved to Mr. Shaffer for use in preparing petitioner's income tax returns,[3] and that Mr. Shaffer had retained the records until he turned them over to petitioner's attorney on September 2 (Pet. App. A9). It concluded that the summons was issued "pursuant to a legitimate purpose" in connection with the joint investigation, and accordingly ordered that the records be produced (Pet. App. A11–A13).[4] Petitioner's claims were rejected on the ground that the summons did not involve any material in petitioner's possession (Pet. App. A12).

Only petitioner appealed, and the court of appeals affirmed (Pet. App. A4–A6). It held that the summons was proper since the investigation included "a legitimate civil purpose," and that the Fifth Amendment privilege did not apply since "the records were not in the intervenor's [petitioner's] possession but were in the custody of her accountant. She had voluntarily relinquished her control of the records" (Pet. App. A5–A6).

## ARGUMENT

There is no conflict of decisions or other reason warranting further review.

1. Petitioner's principal contention (Pet. 5–13) is that she would be compelled to testify against herself in violation of the Fifth Amendment privilege against self-incrimination if her bookkeeper is required to produce the records which she gave to him for use

[3] The information in petitioner's tax returns was taken directly from these records (R. 20, 24–25).

[4] Because the records were then actually held by Attorney Rocovich, the court's order is directed to him (Pet. App. A12–A13).

in preparing her federal income tax returns. But the district court's order is directed solely to the bookkeeper, and he is the only one compelled under it to do something.[5] "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States,* 228 U.S. 457, 458; cf. *Burdeau* v. *McDowell,* 256 U.S. 465, 467. Since petitioner has not been ordered to produce documents or to testify, the privilege against self-incrimination does not apply.

2. Petitioner also contends (Pet. 5–13) that production of the records would be an unreasonable search and seizure in violation of the Fourth Amendment. In the circumstances here, however, there is no violation.

The reliance on *Boyd* v. *United States,* 116 U.S. 616, is misplaced. In that case, unlike the present one, the production order was issued in the context of an essentially criminal proceeding and was directed against the owner of the property, who by responding would have had to authenticate the evidence that he claimed was incriminating, in violation of the Fifth Amendment. Nor is this a case like *Schwimmer* v. *United States,* 232 F. 2d 855 (C.A. 8), or *United States* v. *Guterma,* 272 F. 2d 344 (C.A. 2), where the owner put his records in storage or in a safe and retained

[5] Though the order to produce the records was directed to petitioner's attorney, Mr. Rocovich, this resulted from the fact that the bookkeeper, *after* the summons was served upon him, ignored it and instead turned the records over to the attorney. The parties' rights or obligations were fixed when the summons was served, and the transfer did not alter them. See *United States* v. *Zakutansky,* 401 F. 2d 68, 72 (C.A. 7), certiorari denied, 393 U.S. 1021; *United States* v. *Lyons,* 442 F. 2d 1144 (C.A. 1).

constructive possession of them. Here, petitioner gave the records to her bookkeeper with the understanding that he would use the information contained therein in income tax returns, and would have to certify under penalties of perjury that the returns were correct to the best of his knowledge. See Sec. 6065, Internal Revenue Code of 1954 (26 U.S.C.); Treasury Regulations on Income Tax (1954 Code), § 1.6065–1 (26 C.F.R.). He retained the records after completing the returns. And he made no independent work papers of his own, so that if questioned about his work product he would have had to use the records.

In this context petitioner is not correct in characterizing the bookkeeper as a mere "naked possessor" (Pet. 11), nor does enforcement of the summons violate the Fourth Amendment. See *Falsone* v. *United States,* 205 F. 2d 734, 739 (C.A. 5), certiorari denied, 346 U.S. 864; cf. *United States* v. *Wallace Co.,* 336 U.S. 793, 796–797; *Hinchcliff* v. *Clarke,* 371 F. 2d 697, 700–701 (C.A. 6); *DeMasters* v. *Arend,* 313 F. 2d 79, 85 (C.A. 9), petition for a writ of certiorari dismissed, 375 U.S. 936.[6] It has not been held by this Court, nor to our knowledge by any other, that a summons or

[6] In the *Hinchcliff case*, which petitioner cites (Pet. 7) as *United States* v. *Graf*, the government assured the court of appeals (371 F. 2d at 701) that there would be no criminal prosecution in any event. In this respect, of course, the case was different from the present one. *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4), which petitioner also cites (Pet. 8), is inapposite to the issue here. That case held that evidence obtained by a special agent who had not given warnings of constitutional rights as required by Internal Revenue Service regulations must be suppressed. Nothing the agents did in this case violated any agency rule.

subpoena directed at a third party who possesses papers for a proper use raises Fourth Amendment rights on behalf of a person who claims some kind of ultimate ownership of the papers. Moreover, even if in the context of a simple criminal case such an owner might have a Fourth Amendment claim, the Amendment clearly does not apply to a summons issued in a civil proceeding. The essential purpose of the summons here is to help ascertain petitioner's civil tax liability. Further, it is inappropriate to test petitioner's Fourth Amendment claim in this civil suit.

3. The court of appeals correctly concluded that, contrary to petitioner's contentions (Pet. 14–18), the summons was enforceable under the test of *Donaldson* v. *United States*, 400 U.S. 517, since the investigation in question had "a legitimate civil purpose" (Pet. App. A5). The claim that the Revenue agents "are chiefly interested in criminal fraud" (Pet. 16) is refuted by the district court's finding (Pet. App. A11), sustained by the court of appeals (Pet. App. A6), that there was "a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud * * *." As the Court admonished in *Donaldson* (400 U.S. at 535), "the special agent may well conduct his investigation jointly with an agent from the Audit Division," and "their combined efforts are directed to both civil and criminal infractions." Noting that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (*ibid.*), the Court refused to deny enforcement solely because a

special agent had entered the case (400 U.S. at 535-536):

> To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
SCOTT P. CRAMPTON,
*Assistant Attorney General.*
JOHN P. BURKE,
JOHN M. BRANT,
*Attorneys.*

MARCH 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972